United Nations CCPR/C/120/D/2326/2013/Rev.1

International Covenant on Civil and Political Rights

Distr.: General
10 January 2018

Original: English

Human Rights Committee

Revised Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2326/2013*, **

Communication submitted by:	N.K. (represented by counsel, Johannes Jeremias Weldam)
Alleged victim:	The author
State party:	Netherlands
Date of communication:	10 December 2013
Document references:	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 9 January 2014 (not issued in document form)
Date of adoption of Views:	18 July 2017
Subject matter:	Compulsory DNA profiling of child in conflict with the law
Procedural issues:	Admissibility — other procedure
Substantive issues:	Arbitrary or unlawful interference with privacy; due process guarantees for children in conflict with the law
Articles of the Covenant:	14 (4) and 17
Articles of the Optional Protocol:	5 (2) (a)

1. The author of the communication is N.K., a Dutch national born in 1994. She claims to be victim of a violation by the State party of articles 14 (4) and 17 of the Covenant. The Optional Protocol entered into force for the Netherlands on 11 March 1979. The author is represented by counsel.

* Adopted by the Committee at its 120th session (3–28 July 2017).

** The following members of the Committee participated in the examination of the communication: Tania Maria Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Sarah Cleveland, Ahmed Amin Fathalla, Olivier de Frouville, Christof Heyns, Yuji Iwasawa, Bamariam Koita, Duncan Laki Muhumuza, Photini Pazartzis, Mauro Politi, José Manuel Santos Pais and Margo Waterval. The text of two individual opinions by Committee members Yadh Ben Achour and Yuval Shany is annexed to the present Views.

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The facts as presented by the author

2.1 On 18 March 2009, the Children's Judge of the District Court of Almelo convicted the author for an act of public violence[1] — consisting in verbal aggression[2] — and theft in association with others, and sentenced her to 36 hours of community service, replaceable by 18 days in a detention centre for children. On the same date, the District Public Prosecutor's Office ordered that the author present herself to the local police station in order to have her DNA sample taken. This order was based on article 2 (1) of the Dutch DNA Testing (Convicted Persons) Act (the "DNA Testing Act"), which requires the public prosecutor of the first instance court that rendered the judgment to order that a DNA sample be taken from a person who has been convicted of an offence for which pretrial detention may be imposed[3] or an offence carrying a statutory maximum prison sentence of at least four years.

2.2 On 8 April 2009, a mouth swab was taken from the author to determine her DNA profile and enter it into the DNA database.

2.3. On 17 April 2009, the author lodged an objection[4] with the Almelo District Court against the decision to have her DNA profile determined and processed, invoking a violation of her rights under article 8 (right to respect for private and family life) of the European Convention for the Protection of Human Rights and Fundamental Freedoms and articles 3 (best interest of the child) and 40 (protection of children in conflict with the penal law) of the Convention on the Rights of the Child. The author also stated that, given her age and the fact that she had been convicted for the minor offence of verbal violence, her case fell within the exception provided under article 2 (1) (b) of the DNA Testing Act. According to this provision, no order for DNA sample collection will be made if, "in view of the nature of the offence or the special circumstances under which it was committed, it may reasonably be assumed that the determination and processing of the DNA profile will not be of significance for the prevention, detection, prosecution and trial of criminal offences committed by the person in question."

2.4 On 14 May 2009, a three-judge panel of the Almelo District Court declared the author's objection to be unfounded. The Court considered that the DNA Testing Act did not distinguish between convicted adults and children and that the exception under article 2 (1) (b) of the DNA Testing Act did not require that the public prosecutor include and provide reasoning in his order as to whether the exception applied to each individual case. The public prosecutor was however obliged to include other circumstances such as the nature of the crime, the real gravity of the offence and the circumstances under which it had been committed, the severity of the imposed penalty, the extent of a possible risk of recidivism and other personal circumstances. The author submits that there are no means of challenging the decision of the three-judge panel of the Almelo District Court and that she has therefore exhausted all available and effective domestic remedies.

2.5 On 7 September 2009, the author filed a complaint with the European Court of Human Rights, alleging a violation of her right to respect for her private and family life. On 2 May 2013, the Court found the complaint to be inadmissible.[5]

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[1] Section 141 (1) of the Dutch Criminal Code states that "Any persons who commit public acts of violence in concert against persons or property shall be liable to a term of imprisonment not exceeding four years and six months or a fine of the fourth category."

[2] In its decision dated 14 May 2009, the Almelo District Court included in the factual background the author's statement that her participation in the events was limited to verbally contacting the victim a few times.

[3] Those offences are listed in article 67 of the Dutch Code of Criminal Procedure.

[4] Under article 7 (1) of the DNA Testing (Convicted Persons) Act, an objection may be lodged with the district court against the determining and processing of a DNA profile within 14 days from the date on which the tissue sample was taken.

[5] The decision of the Court, sitting in a single-judge formation, was communicated to the author by letter dated 10 May 2013. The letter reads: "In the light of all the material in its possession and in so far as the matters complained of are within its competence, the Court found that the admissibility criteria set out in Articles 34 and 35 of the Convention have not been with (*sic*)…".

The complaint

3.1 The author argues that she was subjected to an arbitrary interference with her private life, in violation of article 17 of the Covenant. The DNA Testing Act does not enable the public prosecutor to balance the various interests at stake. In her case, this was reflected by the fact that the public prosecutor had mistakenly sent an order for DNA testing to the author on 26 November 2008, even though she had not yet been convicted at the time. Apparently DNA testing orders are issued automatically without an assessment of the individual case. The grounds for applying the exception provided under article 2 (1) (b) of the Act are not assessed unless an objection is lodged. An objection can be lodged within 14 days from the date on which the DNA sample is taken and it refers to the determination and processing of the DNA profile in the database, not to the actual taking of the sample.

3.2 The author claims that the authorities did not take into account her best interests and that fact that she was still a child at the time of ordering and taking the DNA sample, in violation of article 14 (4) of the Covenant, according to which, in the case of children in conflict with the law, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation. She also claims that her age was not considered when weighing the interests at stake in testing a DNA sample from her.

3.3 The author further claims that her DNA sample was not taken by medical staff but by a forensic police officer. The taking of a DNA sample by someone other than a doctor or nurse is permitted if the applicant gives explicit permission to that effect. In the DNA test report it is stated that the author did not object to the sample being taken by a police officer. However, she states that she did not sign the report or give her express authorization to that effect. Only the person who took the sample and a witness, both forensic detectives of the Hengelo police force, signed the report. The fact that she did not object on her own initiative does not mean that there was explicit consent. As she was a child, she could not have been expected to be aware of the possibility of objecting to the taking of a sample. Even if she had been aware, she could not have been expected to actually object on her own initiative and before two police officers. The author states that she should have been informed about the person who was going to take the DNA sample and the method used and she should have been explicitly asked for her consent with regard to the person taking the sample. As she was a child, the report should have been co-signed by a legal representative.

State party's observations on admissibility

4. On 27 February 2014, the State party objected to the admissibility of the communication on the grounds that the matter had already been examined by the European Court of Human Rights. It states that, before the Court, the author claimed that no weighing of interests had taken place before the DNA sample was collected and that the manner in which it was collected was not in accordance with the DNA Testing Act. The Court declared the case inadmissible. That decision should be taken into account by the Committee, as the author made similar claims to those brought to the Committee, on the same grounds and to some extent with reference to the same treaty provisions. Should the Committee come to a conclusion different from that of the Court the State party would be confronted with contradictory rulings. A finding by the Committee that the communication is admissible or even well-founded would be extremely difficult to reconcile with the Court's conclusions.

State party's observations on the merits

5.1 On 9 July 2014, the State party noted that the author had appealed the District Court judgment of 18 March 2009, which sentenced her to 36 hours of community service or 18 days in detention. On 4 May 2010, the Arnhem Court of Appeal overturned the judgment of the District Court and, while finding that the author's guilt had been proven, reduced her sentence to a fine of €100 or two days' detention at a centre for children in conflict with the law. That decision was final. Based on that sentence, the author could no longer be defined

as a "convicted person" within the meaning of article 1 (c) of the DNA Testing Act.[6] Therefore, on 11 June 2010, the Public Prosecution Service instructed the Netherlands Forensic Institute to destroy the author's DNA profile. On 18 August 2010, the Public Prosecution Service confirmed to the author that her tissue sample and her DNA profile had been destroyed.

5.2 With regard to the author's allegations relating to article 17 of the Covenant, the State party notes that the right to respect for privacy is recognized under Dutch law but is not absolute. The Committee has already stated that interferences may be allowed provided that they are lawful, proportional and reasonable, and they comply with the provisions, aims and objectives of the Covenant.[7] National legislation complies with those criteria.

5.3 The aim of the DNA Testing Act is to assist in the prevention, investigation and prosecution of offences committed by convicted persons. DNA testing is a highly effective instrument that has contributed substantially to law enforcement in recent years. The collection of DNA material under the Act therefore serves a legitimate purpose, namely, the investigation of criminal offences, and protects the rights and freedoms of others, such as victims of serious violent and sexual offences. There is no investigative tool available that can achieve similar results. It is therefore an appropriate and necessary measure in a democratic society.

5.4 The Act also establishes a proportional measure as it ensures minimal interference by limiting its scope to persons who have received a custodial sentence, juvenile detention order or alternative sanction for offences of such gravity that pretrial detention may be imposed. DNA material cannot be collected for less serious criminal offences or for penalties consisting in a fine. According to article 2 (1) (b) of the Act, tissue samples may not be collected, even for serious offences, when it can reasonably be supposed that the determining and processing of the DNA profile cannot be of relevance to the prevention, investigation and prosecution of criminal offences committed by the convicted person. Compliance with this requirement can be monitored by the courts. Yet, in the interest of effectiveness, it is only in exceptional cases that this provision applies, including cases where it is actually impossible for the person to reoffend (e.g. owing to bodily injury). In that regard, mere repentance or a promise on the part of the convicted person is not enough. The Act provides for a limited weighing of interests by the public prosecutor before the DNA collection order is issued. In the present case, the public prosecutor did not find that the exception was applicable and he was therefore obliged to issue the order to take a DNA sample from the author. The interference with the author's right to privacy was lawful and proportionate as the author had been convicted of a serious offence — street violence — for which an alternative sanction had been imposed.

5.5 Under the DNA Testing Act, a convicted person can lodge an objection with the district court against the determination and processing of his or her DNA profile. No DNA profile can be determined while an objection is pending. The Act does not contemplate a remedy against the collection as such of tissue sample. The rationale behind this is that the person subjected to the Act is mainly affected by having his or her DNA determined and processed, and not by the mere collection of a tissue sample. Against that background, no specific legal remedy is provided for objecting to the DNA collection. However, the person may lodge a civil-law injunction challenging the collection of DNA material. In the present case, the author could have applied to an interim relief judge for an injunction prohibiting the collection of a tissue sample on the grounds that by obtaining a sample for the purpose of DNA testing the State would be committing an unlawful act.

5.6 The DNA sample is obtained in a manner that sufficiently takes into consideration the interests of the individual concerned. The DNA collection involves very minor interference with personal integrity; cells are obtained from the inside of the cheek using a mouth swab. This method is useful and effective in the investigation of criminal offences and the individual concerned suffers no adverse consequences from the collection and

[6] Article 1 (c) of the Act defines as convicted person "anyone who, by final judgment or otherwise, is imposed a penalty consisting in the detention in a young offenders' institution or an alternative sanction ...".

[7] The State party cites the Committee's general comment No. 16 (1988) on the right to privacy.

processing, as long as he or she does not commit any future offences. Both the tissue sample and the DNA profile are codified and stored anonymously. This applies to both adults and children.[8]

5.7 The interference with the author's right to privacy was lawful. She had been convicted of a serious offence, namely street violence, for which an alternative sanction was imposed. There was a statutory basis for the DNA collection, the measure served a legitimate aim and there were safeguards in place to ensure that the interference was proportionate.

5.8 With regard to the author's claims under article 14 (4) of the Covenant, the State party is of the view that the taking of a tissue sample from the author for the purpose of DNA testing and the determining and processing of her DNA profile in the DNA database are not contrary to the above provision.

5.9 The State party notes that the DNA Testing Act does not apply to children below the age of 12 (age of legal responsibility). The Act does not distinguish between children and adults because there is no reason to make a legal distinction between them for the purpose of preventing, investigating and prosecuting criminal offences. Therefore, the provisions of the Act are not contrary to children's interest.[9] However, the public prosecutor does have the possibility of weighing the interests involved before ordering that a tissue sample be taken and district courts can examine whether that assessment was correct.[10] That does not mean that, in an individual case involving a minor, a court cannot declare an objection to the determining and processing of a DNA profile to be well founded. There are examples in the jurisprudence whereby, after assessing an objection to the determining and processing of DNA, the court has held that, in the case at hand, the measure would not be relevant to the aims of the Act.

5.10 Regarding the author's claims on the manner in which DNA samples were collected, the State party argues that under the DNA Testing Act, tissue samples must be collected by a physician or a nurse. However, article 3 (3) of the DNA (Criminal Cases) Tests Decree establishes that, "provided the convicted person does not object, samples of cheek cells or hair follicles may be collected from a convicted person by an investigating officer designated for this purpose by the public prosecutor … who meets the requirements laid down by ministerial order." Article 8 of the Decree states that, to meet the requirements, the investigation officer: (i) must have successfully completed a course on DNA collection given by the Criminal Investigation College and certified by the Police Examination Centre; and (ii) must not be involved in the investigation for which the sample is being taken. Article 4 of the Decree states that the DNA collection must be conducted in the presence of an investigating officer who must draw up an official report. If the collection was taken by a person other than a physician or a nurse, the report should state that the convicted person did not object to that effect. In the present case, the official report of the DNA collection does not show that the author objected at the time. Explicit consent is not required by law. The mere fact that, in a particular case, a tissue sample is being collected from a child is not an argument for employing a different procedure. The author also did not demonstrate the disadvantage that she allegedly suffered because the tissue sample was taken by an investigating officer. The convicted person is not required to sign the DNA collection report. In that report, the investigating officer records the procedures performed or any information that came to his attention. Since the officer signs the report under oath, it must be assumed, in principle, to be correct. It follows from the nature of the report that there is

[8] The State party cites the European Court of Human Rights judgment of 20 January 2009 in *W. v. Netherlands*, in which the Court was satisfied that the Dutch DNA Testing Act "contained appropriate safeguards against blanket and indiscriminate retention of DNA records" given that DNA can only be taken from persons convicted of an offence of a certain gravity, and that "the DNA records can only be retained for a prescribed period of time that is dependent on the length of the statutory maximum sentence that can be imposed for the offence that has been committed."

[9] Ibid.

[10] The State party cites a Hertogenbosch District Court decision of 14 November 2008 in the case of a 16-year-old who had been convicted of a crime, in which the court found that the criminal offence could be regarded as a "single youthful indiscretion" and the collection of DNA material would not be relevant to the aims of the Act.

no need for the convicted person to sign it, whether a child or his or her representative. Also, the author has failed to explain how her interest would have been affected by failing to sign the report.

Author's comments on the State party's observations

6.1 On 10 September 2014, the author noted that the decision of the European Court of Human Rights did not specify the inadmissibility grounds on which her communication was dismissed. Furthermore, the case is no longer pending before the Court.

6.2 The author notes that neither she nor her representatives are aware of the destruction of her DNA profile and that she never received the letter dated 18 August 2010 mentioned by the State party.

6.3 The author challenges the State party's allegation that the storing of DNA material has no negative consequences for her unless she reoffends. She notes that, once the material is stored, it is subject to potential mismanagement. In a study ordered by the Minister of Justice and Security in 2011, 1,700 mistakes in documents of the Netherlands Forensic Institute were found between 1997 and 2010, accounting for 1.3 per cent of the total investigations.

6.4 The author further challenges the State party's allegation that she was convicted for a serious offence of street violence, noting that it was merely a "school incident". In its decision of 4 May 2010, the Arnhem Court qualified the offence as "overt force". The Court noted that both the author's parents and the school had already punished the author, that it was her first offence and that she was still very young at the time. The author notes that she was not given a penalty for the open violence, only for the offence of theft, which was prosecuted by a different prosecutor's office and was later tried by the Court of Appeal as a joint case. The order to take a tissue sample and determine and process her DNA profile did not cover the crime of theft. Also, from the penalty imposed on appeal (fine of €100), it can be concluded that it was not a serious offence.

6.5 The DNA Testing Act does not distinguish between adults and children, as recognized by the State party and, in practice, the weighing of interests — including the interest of the child — does not take place before an order requesting DNA testing is issued. Furthermore, interests are weighed only if the person concerned objects to the determination and processing of the DNA profile.

6.6 The author reiterates that she was not informed of her right to object to the person performing the mouth swab. Children should not be expected to know their rights. Therefore the State has an obligation to inform them of those rights and to obtain their or their representative's express consent. When offenders are children, guarantees should be in place to take their best interest into consideration.

6.7 The author requests financial compensation as reparation for the violation of her rights and to cover the cost of legal assistance.[11] She also notes that she is open to a friendly settlement.

State party's additional observations

7.1 In its submission dated 24 November 2014, the State party reiterated its arguments relating to the examination of the case by the European Court of Human Rights and to the fact that the case had become moot because the author's DNA profile had been destroyed.

7.2 With regard to the author's statements concerning the errors in DNA investigations, the State party notes that the Netherlands Forensic Institute is an institution accredited to perform DNA tests and is subject to yearly controls of its work quality. The control system includes the registration of anomalies, which vary from technical problems to human errors or contamination, none of which have any repercussions under criminal law.[12] The

[11] The author notes that the legal assistance in this procedure is financed by the State party and that the personal contribution is €129.

[12] The State party cites the follow-up study by the Public Prosecutor Service. See Netherlands, House of Representatives, Parliamentary papers 2011–2012, 33000 VI, no. 71.

corrective measures taken to address anomalies are also registered. The number of notifications (1,900) rose in the period 1997 to 2010 simply because of the increase in the number of DNA analyses done every year and the use of increasingly sensitive equipment.

7.3 The State party insists that street violence committed against persons in association with others cannot be dismissed as "youthful impetuosity". Both the children's judge at the Almelo District Court and the Arnhem Court of Appeal considered that the author had been proven guilty of this offence. The Court of Appeal considered that the author had no criminal record and that she was very young when she committed the offence. It therefore reduced the penalty on that basis — not because it considered the offence not to be serious.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol.

8.2 The Committee notes the State party's argument that the same case had already been considered and declared inadmissible by the European Court of Human Rights. However, the Committee observes that the case is no longer pending before that Court. In the light of the foregoing, the Committee considers that there is no obstacle to the admissibility of the communication under article 5 (2) (a) of the Optional Protocol.

8.3 The Committee considers that the author has sufficiently substantiated her claims under articles 14 (4) and 17 of the Covenant for purposes of admissibility. As no other issues concerning admissibility arise, the Committee declares the communication admissible, insofar as it appears to raise issues under articles 14 (4) and 17 of the Covenant, and proceeds to its consideration of the merits.

Consideration of the merits

9.1 The Committee has considered the communication in the light of all the information submitted to it by the parties, in accordance with 5 (1) of the Optional Protocol.

9.2 The Committee notes the author's argument that her subjection to DNA testing constituted an arbitrary interference in her private life, in violation of article 17 of the Covenant. She alleges, in particular, that neither her age nor the nature of the crime for which she was convicted were taken into account by the public prosecutor when ordering the DNA testing; that DNA testing orders are issued automatically, without an assessment of the individual circumstances of each case; and that the scope for filing an objection does not include the actual taking of the sample.

9.3 The Committee considers that the collection of DNA material for the purpose of analysing and storing the collected material in a database that could be used in the future for the purposes of criminal investigation is sufficiently intrusive as to constitute "interference" with the author's privacy under article 17 of the Covenant.[13] Even if, as the State party indicates, the author's DNA profile was later destroyed as a result of the new conviction on appeal, the Committee considers that interference with the author's privacy had already ensued. The issue that arises is whether such interference was arbitrary or unlawful under article 17 of the Covenant.

[13] The Committee concurs with the following analysis by the European Court of Human Rights in the case of *S. and Marper v. the United Kingdom*, judgment of 4 December 2008, para. 72–73: "... In addition to the highly personal nature of cellular samples, the Court notes that they contain much sensitive information about an individual, including information about his or her health. Moreover, samples contain a unique genetic code of great relevance to both the individual and his relatives." "Given the nature and the amount of personal information contained in cellular samples, their retention *per se* must be regarded as interfering with the right to respect for the private lives of the individuals concerned."

9.4 The Committee notes the State party's argument that DNA testing as regulated by the Dutch DNA Testing Act serves a legitimate purpose, namely, the investigation, prosecution and trial of serious criminal offences and the protection of the rights of others, including potential victims of violent or sexual crimes. It is proportional, given that it ensures minimal interference as the sample is taken in the least invasive way; the sample is stored anonymously for a limited period of time; the procedure is limited to persons convicted for crimes of a certain gravity; and it is necessary in a democratic society, given the absence of another equally effective tool in preventing and investigating such crimes.

9.5 The Committee recalls that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and reasonable in the particular circumstance.[14] The notion of arbitrariness includes elements of inappropriateness, injustice, lack of predictability and due process of the law,[15] as well as elements of reasonableness, necessity and proportionality.[16] Even though, in society, the protection of privacy is necessarily relative, the competent public authorities should only be able to obtain information relating to an individual's private life if such information is essential in the interest of society, as understood under the Covenant.[17] Even with regard to interference that is in conformity with the Covenant, relevant legislation must specify in detail the precise circumstances in which such interference may be permitted. A decision to make use of such authorized interference must be made only by the authority designated under the law and on a case-by-case basis.[18]

9.6 In the present case, the Committee notes that, on 18 March 2009, the author was sentenced to 36 hours of community service for an act of verbal violence and theft. On the same date, the District Public Prosecutor ordered that she be submitted to DNA testing and the tissue sample was taken on 8 April 2009. Although the State party has provided explanations as to the content and general application of the DNA Testing Act, it has not indicated why it was necessary, in the light of the State party's stated legitimate aim, to submit the author to compulsory DNA testing considering her participation in and the nature of the criminal acts.

9.7 The Committee notes the author's statement that, under the DNA Testing Act, DNA testing orders are issued automatically for persons who have been given a custodial sentence, juvenile detention order or alternative sanction for offences of such gravity that pretrial detention may be imposed. The State party has admitted that the Act only provides for limited weighing of interests by the public prosecutor before issuing the order for tissue sample collection. The Committee also notes that, even though exceptions to DNA testing do exist under article 2 (1) (b) of the Act, they are very narrowly construed and do not include, for instance, consideration for the age of the offender, as acknowledged by the State party. According to the State party, article 2 (1) (b) of the Act applies only in exceptional cases, for instance in cases where it is actually impossible for the person to reoffend (such as owing to bodily injury) (see para. 5.4 above).

9.8 The Committee also notes that the Act does not contemplate a remedy against the collection of tissue sample, only against the determination and processing of a person's DNA profile. The State party alleges that a person may lodge a civil-law injunction challenging the collection of a tissue sample on the grounds that, by obtaining a sample for the purpose of DNA testing, the State is committing an unlawful act. However, the State party has not demonstrated that such a remedy would be effective, taking into account, in particular, that the collection of tissue sample is "lawful" under domestic law. The

[14] See the Committee's general comment No. 16, para. 4. See also *S. and Marper*, para. 107, in which the Court stated that: "... The core principles of data protection require the retention of data to be proportionate in relation to the purpose of collection and insist on limited periods of storage.".

[15] See, inter alia, the Committee's general comment No. 35 (2014) on liberty and security of person, para. 12, and communications No. 2009/2010, *Ilyasov v. Kazakhstan*, Views adopted on 23 July 2014, para. 7.4, and No.2081/2011, *D.T. and A.A. v. Canada*, Views adopted on 15 July 2016, para. 7.6.

[16] See the Committee's general comment No. 35, para. 12.

[17] See Committee's general comment No.16, para. 7.

[18] Ibid., para. 8.

Committee also notes that there is no appeal available against a court decision rejecting the objection to the processing of a person's DNA profile.

9.9 The Committee notes the State party's position that the tissue sample collection involves very minor interference with a person's privacy because both the tissue sample and the DNA profile are codified and stored anonymously. However, the Committee also notes that the tissue sample and the profile are kept for 30 years in cases of serious offences, and 20 years in the case of less serious offences.

9.10 Finally, the Committee notes the State party's argument that the Act does not distinguish between children and adults because there is no reason to make a legal distinction between them for the purpose of preventing, investigating and prosecuting criminal offences and that the Act is not contrary to the best interest of the child. The Committee however considers that children differ from adults in their physical and psychological development, and their emotional and educational needs.[19] As provided for, in, among others, articles 24 and 14 (4) of the Covenant, State parties have the obligation to take special measures of protection.[20] In particular, in all decisions taken within the context of the administration of juvenile justice, the best interest of the child should be a primary consideration.[21] Specific attention should be given to the need for the protection of children's privacy at criminal trials.[22] As explained by the author, her age was never taken into consideration, including throughout the tissue sample collection process, where she was not informed of the possibility of objecting to the sample being collected by a police officer, nor was she informed of the possibility that she could be accompanied by her legal representative.

9.11 Accordingly, the Committee finds that, although lawful under domestic law, the interference with the author's privacy was not proportionate to the legitimate aim of prevention and investigation of serious crimes. Therefore, the Committee concludes that such interference was arbitrary and in violation of article 17 of the Covenant.

9.12 Having concluded that, in the present case, there has been a violation of article 17 of the Covenant, the Committee decides not to separately examine the author's claims under article 14 (4) of the Covenant.

10. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it amounts to a violation of article 17 of the Covenant.

11. In accordance with article 2 (3) (a) of the Covenant, the State party is under an obligation to provide individuals whose Covenant rights have been violated with an effective remedy in the form of full reparation. Accordingly, the State party is obligated to, inter alia, provide N.K. with adequate compensation. The State party is also under an obligation to prevent similar violations from occurring in the future.

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[19] See Committee on the Rights of the Child, general comment No. 10 (2007) on children's rights in juvenile justice, para. 10, and CRC/C/NLD/CO/4, paras. 58–59, in which the Committee expressed concern about DNA testing of children in conflict with the law and recommended that the State party eliminate the practice of DNA testing of children in conflict with the law and erase the criminal record of children who have been acquitted or have completed their sentence.

[20] See the Committee's general comment No. 17 (1989) on the rights of the child, and communication No. 2107/2011, *Berezhnoy v. Russian Federation*, Views adopted on 28 October 2016, para. 9.7.

[21] See Committee on the Rights of the Child, general comment No. 10 (2007) on children's rights in juvenile justice, para. 10.

[22] See *S. and Marper v. The United Kingdom*, para. 124.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy where a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views and, to have them widely disseminated in the official language of the State party.

Annex I

English
[Original: French]

Individual opinion (dissenting) of Committee member Yadh Ben Achour

1. In the present case (No. 2326/2013, *N.K. v. the Netherlands*), the Committee found a violation of article 17 of the Covenant, on the grounds that the State party's interference, by collecting a tissue sample by oral smear ordered by a prosecutor with a view to establishing the author's DNA profile, was disproportionate. Such interference was judged to be disproportionate with regard to the legitimate aim of Dutch law governing DNA testing, which consists in preventing and prosecuting serious crimes. I should like in the present opinion to explain the reasons why I disagree with the Committee.

2. Let me say straight away that the present case does not resemble that judged by the European Court of Human Rights, on 4 December 2008, in *S. and Marper v. the United Kingdom*, which appears to have influenced the present Views to some extent. In the case of *S. and Marper*, the complainants objected to the fact that the authorities retained their finger prints, tissue samples and DNA profiles after the conclusion, by acquittal and dropping of the charges respectively, of the criminal proceedings against them. The difference is considerable, from every point of view.

3. As the Committee recognizes, the interference in question meets all the validity criteria normally required in the event of restrictions being applied to fundamental rights recognized by the Covenant. It is according to the law, serves a legitimate purpose and offers sufficient guarantees (exact determination of the scope of the law regarding DNA testing, test ordered by a judge, possibility of objecting to the sampling, appeal always available before a court, anonymity and limitation in time of the retention of the data). It therefore fulfils the requirements of a demographic society. The Committee does not so much find that the law itself but rather that the act of sampling and retaining the sample to be disproportionate. This is the point which I find debatable. Neither the law, nor the prosecutor's order to proceed with the sampling, nor its effects over time on the author's rights appear disproportionate in the relation to the objective pursued.

4. Initially, the Committee itself considered that the collection of tissue samples to establish a DNA profile was justified and deemed necessary in a democratic society. At the same time, the DNA sampling by smear of the oral epithelium is not an invasive act, but only a very limited process, especially if measured against the legitimate aim pursued by the law. The author objects to the fact that the State party failed to take account of her age and the higher interest of the child, which is internationally protected. However, in its decision of 4 May 2010, the court of appeal did not overlook the age of the complainant (para. 6.4). Moreover, the data are stored anonymously and therefore cannot constitute an infringement of privacy, and the storage is limited in time. Lastly, and above all, the personal data concerning the author stored in the genetic data bank were destroyed, following the decision of the Court of Appeal of Arnhem of 4 May 2010, which reduced the penalties handed down in first instance.

5. In countering the State party's argument concerning the destruction of the author's data following the decision of the appeal court, the Committee considers that "Even if, as the State party indicates, the author's DNA profile was later destroyed as a result of the new conviction on appeal, [...] interference with the author's privacy had already ensued". Certainly the sampling "had already ensued", but the situation must be seen from a general point of view and in toto. You cannot objectively appreciate this case if you proceed by chronological fragmentation, by concentrating on the fact that the sampling had already ensued and forgetting that the act in question had quite simply been cancelled and made good as a result of the internal mechanisms of the State party. For that reason, no further objection can be raised against the State party.

6. With respect to all the considerations outlined in paragraphs 3, 4 and 5, the principle of proportionality was therefore respected. The Committee has not given enough weight to all these data.

Annex II

Individual opinion of Committee member Yuval Shany (partly concurring, partly dissenting)

1. I regret not being able to fully share the reasoning offered by the majority of the Committee, underlying its finding that the State party violated the author's rights under article 17 of the Covenant.

2. I fully support the proposition that the best interests of the child should be a primary consideration in the administration of juvenile justice and that due weight should be given to the special physical, psychological, emotional and educational needs of children (para. 9.10). I am therefore of the view that the State party should have afforded the author special measures of protection during the process of collecting her DNA sample, including ensuring her ability to object to the collection of the sample by a police officer and her right to be accompanied during the collection by a legal representative. I accept that the State party appears to have failed to meet this "special protection" standard — the State did not rebut the author's claim that neither she nor her legal representative were informed of the right to object to the collection of the DNA sample by a police office — and that, as a result, the application to the author of a mouth swab in order to collect the sample may have resulted, in the circumstances of the case, in a violation of article 17 of the Covenant.

3. I am, however, unpersuaded by the holding by the majority that the very decision to collect and store the author's DNA sample fell short of the above-mentioned "special protection" standard due to the author.

4. Although the Dutch DNA Testing Act does not distinguish between juvenile and adult offenders, such a distinction is inherent in its application. Since it applies to offenders who have been convicted of a serious offence (entailing a maximum penalty of no less than four years), and with regard to whom a sentence involving a deprivation of liberty has been imposed, it only applies to juvenile offenders whose conduct was deemed by the juvenile court to be sufficiently serious to warrant deprivation of liberty under the legal standards applied by juvenile justice system. It has not been alleged to us that the age of the author was not given due consideration by the juvenile court in determining the author's sentence, and, by extension, in determining the applicability of the DNA Testing Act to her. In fact, the decision of the Arnhem Court of Appeal of 4 May 2010 to change the author's sentence from community service to a fine has resulted in the disapplication to her of the DNA Testing Act and the destruction of her DNA sample.

5. Furthermore, the author has not been able to refute the State party's claim (para. 5.9) that domestic courts can sustain objections to the collection of DNA samples of juvenile offenders based on their age and the circumstances of the offence, and have done so in the past. It is also uncontested that a domestic court considered the personal circumstances of the author when reviewing whether an exemption from the application of the Act was warranted and that it came to the conclusion that it was not (para. 2.4).

6. I am therefore unable to accept the majority's holding that the age of the author was not taken into consideration by the State authorities in the process leading up to the decision to collect her DNA samples.

7. In addition, no information was provided to us that should cause us to question the holding of the European Court of Human Rights, according to which the DNA database retained by the Netherlands contains adequate privacy safeguards (the database comprises encoded data stored anonymously and is used only to resolve future crimes), even when applied to minors.[1]

[1] See European Court of Human Rights, *W. v. Netherlands* (application No. 20689/08), judgment of 20 January 2009.

8. As a result, I do not consider it established that the balance struck by the State party in the particular circumstances of the case between the need to protect the public from recidivist criminals and the need to afford minors special privacy protections commensurate with their age was unreasonable. Thus, I do not support the conclusion of the Committee that the very decision to collect DNA samples from the author violated her rights under article 17 of the Covenant.